

No. 92-1911

Supreme Court, U.S.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1993

PUD No. 1 of JEFFERSON COUNTY  
AND THE CITY OF TACOMA,

v. *Petitioners,*

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,  
DEPARTMENT OF FISHERIES AND  
DEPARTMENT OF WILDLIFE

On Writ of Certiorari to the  
Supreme Court of the State of Washington

**BRIEF FOR THE PETITIONERS**

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## QUESTIONS PRESENTED

1. Whether the State of Washington, Department of Ecology, exceeded its authority under § 401 of the Clean Water Act ("CWA"), by conditioning a water quality certificate for a proposed hydroelectric project subject to the Federal Power Act ("FPA") on instream flow quantities for fish habitat that are concededly in excess of requirements necessary for the protection of water quality?

2. Whether Congress intended § 401 of the CWA to repeal the FPA's reservation to the Federal Energy Regulatory Commission of comprehensive responsibility for determining in the FPA licensing process all relevant fish and wildlife, and other environmental conditions, except those contained in State-issued water quality certificates pertaining to the abatement and control of the discharge of pollutants?

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On Writ of Certiorari to the  
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**BRIEF FOR THE PETITIONERS**

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**OPINIONS BELOW**

The opinion of the Supreme Court of the State of Washington ("Washington Supreme Court"), No. 58272-6 filed April 1, 1993 (Pet. App. 3a), is reported at 121 Wash. 2d 179 and 849 P.2d 646. The "Findings of Fact, Conclusions of Law and Final Judgment" of the Superior Court of the State of Washington in and for the County of Thurston ("Superior Court") were filed August 14, 1991 (Pet. App. 29a). The Superior Court's Memorandum Opinion was filed May 8, 1991 (Pet. App. 37a). The "Revised Final Findings of Fact, Conclusions of Law and Order" of the State of Washington Pollution Control Hearings Board ("PCHB" or "Board") were issued January 25, 1989 (Pet. App. 46a). The PCHB's "Order Granting Cross Motion For Summary Judgment" was issued April 10, 1987 (Pet. App. 74a) and its "Order Denying Second Motion For Summary Judgment" was



issued December 9, 1987 (Pet. App. 70a). The letter order of the State of Washington Department of Ecology granting request for water quality certification was issued June 11, 1986 (Pet. App. 82a). The decisions of the Superior Court, the PCHB and the Department of Ecology are unreported.

### JURISDICTION

The opinion of the Supreme Court of Washington filed on April 1, 1993 (Pet. App. 3a) became the decision terminating review in that court, and therefore its judgment, on April 21, 1993 (Pet. App. 1a). The petition for a writ of certiorari was filed on June 1, 1993 and granted on October 4, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

### STATUTES INVOLVED

Sections 301, 302, 303, 306, 307, 401 and 510 of the Clean Water Act ("CWA"), also known as the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. §§ 1311, 1312, 1313, 1316, 1317, 1341 and 1370; and 4(e), 10(a)(1), 10(j) and 15(a)(2)-(3) of the Federal Power Act ("FPA"), 16 U.S.C. §§ 797(e), 803(a)(1), 803(j) and 808(a)(2)-(3), are reproduced at Pet. App. 86a-146a.

### STATEMENT

Petitioners are PUD No. 1 of Jefferson County, Washington, and the City of Tacoma, Washington (herein, jointly, "Tacoma"). They propose to construct the Elkhorn Hydroelectric Project on the Dosewallips River in the State of Washington.<sup>1</sup> On March 18, 1986 Tacoma

<sup>1</sup> PUD No. 1 of Jefferson County is a public utility district organized under Wash. Rev. Code ("RCW") 4.04.020 (1990). The City of Tacoma operates a municipal electric system under RCW 35.92.050 (1990). They are authorized to jointly construct, own and operate electric utility properties by RCW 35.92.280-310 (1990). Respondents are governmental agencies of the State of Washington. There are no parties to this case other than those named in the caption.

applied to the Federal Energy Regulatory Commission ("FERC") for a hydroelectric license under § 4(e) of the FPA, 16 U.S.C. § 797(e). 52 Fed. Reg. 23,342 (1987). Pursuant to FERC regulations (18 C.F.R. § 4.38(a)), Tacoma undertook consultations, starting in 1982, with the Department of Ecology of the State of Washington ("State DOE"), the State Departments of Fisheries and Wildlife, the U.S. Fish and Wildlife Service, the National Marine Fishery Service, and an Indian tribal organization, the Point No Point Treaty Council (R. PCHB Tr., Dec. 15, 1987, 28-30, J.A. 21-23; R. PCHB Ex. A-4, pp. E3-1-E3-45).<sup>2</sup> As required by the FERC, Tacoma also applied to the State DOE for a certificate under § 401 of the CWA, 33 U.S.C. § 1341.

Section 401(a) requires applicants for federal licenses or permits for the conduct of activity "which may result in any discharge" into navigable waters, to obtain from the State "in which the discharge \* \* \* will originate" a certification that "any such discharge will comply" with applicable provisions of CWA § 303 (water quality standards), §§ 301 and 302 (effluent limitations), § 306 (national standards of performance) and § 307 (toxic and pretreatment effluent standards), 33 U.S.C. §§ 1311, 1312, 1316 and 1317.

On June 11, 1986 the State DOE issued a ~~§ 401~~ certificate for the project under § 401 of the CWA (Pet. App. 82a). The certificate contains a condition purportedly under § 401(d). Section 401(d) requires that certifications set forth any applicable effluent and other limitations and monitoring requirements necessary to comply with enumerated sections of the CWA, "and with any other appropriate requirement of State law \* \* \*." The condition prescribes minimum streamflow quantities that must be maintained for fish habitat purposes (Pet. App. 83a). The certificate states that the flows "are in

<sup>2</sup> "PCHB Ex." and "PCHB Tr." refer to the record of hearing before the Washington Pollution Hearing Control Board.

excess of those required to maintain water quality \* \* \* (id.).

Tacoma appealed the minimum flow conditions. It contended that water quantities for such a purpose must be determined under the comprehensive balancing process in Part I of the FPA, not by state-imposed conditions under CWA § 401 (Pet. App. 3a-28a). The Washington Supreme Court rejected Tacoma's contentions. (Pet. App. 3a-28a). Processing of Tacoma's application at the FERC has been delayed pending final resolution of the scope of the State's authority under § 401 of the CWA to require minimum streamflow quantities at hydroelectric projects subject to FERC license.

#### A. The Elkhorn Hydroelectric Project.

The Elkhorn Hydroelectric Project is a new facility which the City of Tacoma and PUD No. 1 propose to construct on the Dosewallips. It would operate in a run-of-river mode, i.e., it would divert, but not store water (Pet. App. 4a; 31a; 61a-62a; 75a-76a). The project would consist of a low (10-foot) diversion weir in the river, a 9-foot diameter tunnel ("penstock") running 1.2 miles downstream and a powerhouse containing two hydro-powered generating units rated at 8.9 MW and 4.4 MW at a head of 295 feet (Pet. App. 61a; 52 Fed. Reg. 23,342 (1987)).

The river segment between the diversion portal and the project's tailrace (where diverted waters return to the river) is known as the by-pass reach. This reach would be located in a canyon. Several fish species populate the reach. The river's flows down the five percent gradient of this reach are fed by snowmelt and glacial run-off that turn it into a torrent of cascading water, except during low flow periods beginning in late August or early September (Pet. App. 61a; R. PCHB Tr., Dec. 15, 1987, 23-24). As proposed in Tacoma's License Application to FERC, the penstock would divert between 50 and 600 cubic feet per second from the river's flow. These proposed diversion volumes would vary with sea-

sonal flows, in order to leave sufficient quantities in the by-pass reach for fish habitat. (R. PCHB Ex. A-4, pp. E3-1 - E3-45.)

#### B. Statutory and Regulatory Background.

##### 1. The Federal Power Act.

Under the FPA, FERC has exclusive authority to issue licenses for new and existing hydroelectric projects. FPA §§ 4(e), 15, 23(b), 16 U.S.C. §§ 797(e), 808, 817(b). This authority includes original licenses of the kind sought by Tacoma, and license renewals, known as "new licenses," which must be obtained when an original license term expires. FPA § 15, 16 U.S.C. § 808.

The FPA requires FERC, in deciding whether to issue a license, to give equal consideration to power and development purposes, energy conservation, "the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat)," recreational opportunities, and other aspects of environmental quality. FPA § 4(e), 16 U.S.C. § 797(e).

FPA § 10(a)(1), 16 U.S.C. § 803(a)(1), requires that a project licensed by FERC be "best adapted to a comprehensive plan" for the waterway, taking into account such factors as power development, "the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat)," irrigation, flood control, water supply, and recreational and other purposes referred to in § 4(e).

Finally, FPA § 10(j), 16 U.S.C. § 803(j), provides that "in order to adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat)" affected by a project, the license "shall include conditions for such protection, mitigation, and enhancement." These conditions are to be based on the recommendations of State and federal fish and wildlife agencies, unless FERC finds that such a recommendation is "inconsistent with the pur-



poses and requirements of [FPA Part I] or with other applicable provisions of law." Thus, under § 10(j), FERC may not license the Elkhorn Project unless it adopts streamflow conditions adequate to protect, mitigate damages to, and enhance fish habitat in the project's bypass reach. Such conditions would have to be formulated after full consideration of the streamflow quantities proposed by the State and federal fish and wildlife agencies.

## 2. The Clean Water Act.

a. *Regulatory Structure and Definitions.* The regulatory requirements of the CWA are set forth in Titles III and IV. Title III, "Standards and Enforcement", §§ 301-320, 33 U.S.C. §§ 1311-1330, provides for a system of effluent limitations, water quality standards and requirements for the provision of information and guidelines. Title III is administered by the Environmental Protection Agency ("EPA"), and by the States under the supervision of the EPA.

Title IV, "Permits and Licenses", 33 U.S.C. §§ 1341-1345, establishes a system of State and federal permits and licenses for the regulation of discharges. Title IV includes § 401's State certification requirements for federal licenses and permits; § 402's National Pollutant Discharge Elimination System ("NPDES"), under which EPA may grant permits for the discharge of pollutants; § 403's ocean discharge criteria; and § 404's permitting system for discharges of dredged or fill material, administered by the Corps of Engineers ("the Corps").

Section 502, 33 U.S.C. § 1362, defines many of the terms in the CWA regulatory provisions. Under § 502(16), "the term 'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants." The term "discharge of a pollutant" or of "pollutants" means "any addition of any pollutant to navigable waters from any point source \* \* \*." § 502(12). A "point source" is any "discernable, confined and discrete conveyance \* \* \* from which pollutants are or may be discharged." § 502(14). A

"pollutant" means various forms of spoil, wastes and chemicals "discharged into water." § 502(6). The term "pollution" means "the man-made or man-induced alteration of the chemical, physical, biological and radiological integrity of water." § 502(19).

Under §§ 101(g) and 510, 33 U.S.C. §§ 1251(g) and 1370, nothing in the CWA is intended to impair or supersede a State's authority, under its proprietary water laws, to allocate quantities of water in its jurisdiction, or otherwise to impair its rights or jurisdiction with respect to such waters.<sup>3</sup>

b. *Streamflows, Dams and Diversions.* The effect of dams and diversion structures on streamflow is expressly addressed in Title III's provision for federal information and guidelines. Section 304(f), 33 U.S.C. § 1314(f) requires EPA to issue:

- (1) guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants, and
- (2) processes, procedures, and methods to control pollution resulting from—

\* \* \* \*

(F) changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities.

In addition, § 102(b)(6), 33 U.S.C. § 1252(b)(6), provides that FERC licenses for hydroelectric projects may not "include storage for regulation of streamflow for

<sup>3</sup> Section 101(g) provides: "It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State."

Section 510 provides: "Except as expressly provided in this Act, nothing in this Act shall, \* \* \* be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters of such States)."

the purpose of water quality control unless the Administrator [of the EPA] shall recommend its inclusion \* \* \*."

c. *The § 401 Certification Requirement.* FERC has made § 401 certification a part of the hydroelectric licensing process under Part I of the FPA. 18 C.F.R. § 4.38(a). Section 401(a)(1) requires an applicant for a federal license or permit for any activity which may result in a discharge into navigable waters of the United States to obtain a certification from the State in which the discharge originates that "such discharge" will comply with applicable sections of the CWA specifically enumerated in § 401(a), i.e., §§ 301, 302, 303, 306 and 307. If the State fails to act on the request for certification within no more than one year, the § 401 requirement is waived. § 401(a)(1).

Section § 401(d) directs that State certifications shall impose limitations and monitoring requirements "necessary to assure" compliance with:

any applicable effluent limitations and other limitations, under section [301] or [302] of this title, standard of performance under section [306] of this title, or prohibition, effluent standard, or pretreatment standard under section [307] of this title, and with any other appropriate requirement of State law set forth in such certification \* \* \*.

Pursuant to § 401(d), any limitations and conditions included by the State in the § 401 certificate, including those based on "other appropriate requirement[s] of State law" become conditions on the federal license or permit. FERC has ruled that it has no authority to reject or revise conditions in a State water quality certification, even when it concludes that such conditions are outside the scope of § 401, because only the State courts may review such certifications.<sup>4</sup>

<sup>4</sup> *Summersville*, 60 FERC ¶ 61,291 at 61,990 (1992), reh'g denied, 63 FERC ¶ 61,037 (1993); *Carex Hydro*, 52 FERC ¶ 61,216 at 61,770-771 (1990); *Central Maine Power Co.*, 52 FERC ¶ 61,033 at 61,172-173 (1990). See also *Roosevelt Campobello Int'l Park Comm'n v. EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982); *United States*

d. *Water Quality Standards.* Water quality standards under CWA § 303 are among the provisions on which a State may base compliance conditions under § 401(d). Section 303 is incorporated into § 401(d) because it is expressly enumerated in § 401(a), which defines the scope of State authority to certify federally-licensed discharges, and because § 301, which is listed in § 401(d), requires adoption of effluent limitations necessary to meet water quality standards. § 301(b)(1)(C). Section 303(c)(2) of the Act authorizes the States to adopt water quality standards.

Under § 303(c)(2)(A) the term "water quality standard" is defined by the conjunction of two elements: "the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." Section 303(c)(2)(A).

e. *The EPA's Supervision and Approval of State Water Quality Standards.* Under § 303(c), 33 U.S.C. § 1313(c) State-established water quality standards must be reviewed and approved by the EPA.

EPA's regulations reflect Congress' definition of water quality standards in § 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A). They provide that "[a] water quality standard defines the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses." 40 C.F.R. § 131.2. EPA defines "criteria" as "elements of State water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use." 40 C.F.R. § 131.3(b). The criteria must be supported by information sufficient to ensure the "adequacy of the scientific basis of the standards \* \* \*." 40 C.F.R. § 131.6(f). State water quality standards must

*Dep't of Interior v. FERC*, 952 F.2d 538, 548 (D.C. Cir. 1992); *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991); *United States v. Marathon Dev. Corp.*, 867 F.2d 96, 102 (1st Cir. 1989); *Proffitt v. Rohm & Haas*, 850 F.2d 1007, 1009 (3rd Cir. 1988); 40 C.F.R. § 124.55(e).



also include an antidegradation policy. 40 C.F.R. § 131.6 and 131.12. Section 303(c)(2)(A) and EPA's regulations result in a two-step format for State water quality standards. The first step requires the State to designate the "uses" desired for a particular body of water. The second step involves establishment of "criteria"—objective, scientifically ascertainable standards—the implementation of which should ensure attainment of water quality sufficient to achieve and protect the designated uses.

### 3. *Washington's Requirements Concerning Water Quality Standards and Streamflows.*

The State DOE administers the State of Washington's programs under the federal CWA, and decides whether to grant, grant with conditions or deny § 401 certifications. RCW 90.48.260 (Supp. 1992). In accordance with CWA § 303 and RCW 90.48.260, the Department has established "water quality standards for surface waters of the State of Washington." Washington Administrative Code ("WAC") Ch. 173-201, Resp. App. 94a-122a.<sup>5</sup>

EPA approved Washington's standards under § 303 on March 18, 1974. 42 Fed. Reg. 56792 (1977). The standards classify Washington's waters according to uses and the criteria that protect such uses. WAC 173-201-045, Resp. App. 100a. Class AA waters are deemed to be "extraordinary" because they "markedly and uniformly exceed the requirements for all or substantially all uses," including, but not limited to, "fish \* \* \* reproduction, rearing, and harvesting." WAC 173-201-045(1)(a) and (b)(v), Resp. App. 100a. Class AA waters are subject to specific water quality *criteria* which define values for ascertainable factors such as fecal coliform organisms, dissolved oxygen, dissolved gas, temperature, pH, turbid-

<sup>5</sup> The State of Washington's water quality standards were revised on November 25, 1992. For purposes of this brief, citations are to relevant provisions of the WAC as reprinted in the appendix to Respondent's Brief in Opposition to Petition for Writ of Certiorari.

ity, and toxic, radioactive or deleterious material. *Id.*; WAC 173-201-045(1)(c), Resp. App. 100a-101a.

The Dosewallips River is an unappropriated perennial stream with populations of steelhead, trout, and coho and chinook salmon (Pet. App. 4a; 48a-49a). It and its tributaries are classified as Class AA. WAC § 173-201-080(31), Resp. App. 109a.

A separate provision of Washington's water laws, not subject to approval by EPA under § 303, states that perennial streams "shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, and aesthetic and other environmental values, and navigational values." RCW 90.54.020(3)(a) (Supp. 1992).

### C. *Proceedings Below.*

#### 1. *Administrative Action.*

For purposes of formulating conditions under FPA § 10, Tacoma had accepted the recommendation of the agencies and tribes that it undertake an instream flow study using the Instream Flow Incremental Methodology ("IFIM").<sup>6</sup> On the basis of the study, Tacoma proposed to FERC and the agencies and tribes that the Project maintain certain base flows in the by-pass reach, ranging between 65 and 155 cubic feet per second ("cfs") depending on the month. The agencies and tribes recommended minimum flows between 100 and 200 cfs (Pet. App. 5a).

The State DOE imposed in the § 401 certificate the flow quantities recommended by the agencies and tribes, although it expressly ruled that such quantities were not required to maintain water quality in the by-pass reach. It explained:

While these flows are in excess of those required to maintain water quality in the by-pass region, they

<sup>6</sup> IFIM uses a computer modeling study "to determine 'weighted usable area' in a given length of river when flows are varied. The weighted usable area is an indicator of fish habitat \* \* \*." (App. 49a).

are the flows recommend [sic] by the resource agencies and tribes for maintaining sufficient flows for the fishery resource. They are included herein as a matter of cooperation with these other agencies.

Pet. App. 83a-84a. The State DOE's inclusion of the flow conditions in the § 401 certificate became a condition on any license issued, and thus foreclosed FERC from enforcing different flow quantities under FPA § 10(j). In addition, the certification imposed discharge conditions specifically related to construction debris from the project (not challenged here), and a requirement that Tacoma obtain a State water rights permit prior to commencing construction (Pet. App. 83a-84a).

Tacoma appealed the letter order to the PCHB. It moved the Board to grant it summary judgment on the ground that the base flow quantities were not justified by water quality standards or effluent limitations under the CWA. The State DOE did not take issue with this (Pet. App. 77a). The Board concluded that the flow quantities were "not supported by, nor intended to be supported by, water quality standards" (Pet. App. 78a) (emphasis in original). It ruled, however, "that a Section 401 water quality certificate may include limitations to enforce all State water quality-related statutes and rules including, but not limited to, water quality standards." (Pet. App. 79a). The Board subsequently denied Tacoma's second motion for summary judgment, which contended that the State-imposed flow quantities were preempted by the FPA (Pet. App. 70a).

The Board then conducted an evidentiary hearing to resolve two issues: (1) whether the specific base flows imposed by the State DOE are appropriate for preservation of the fishery resource and related values; and (2) what quantity and type of fish inhabit the waters affected by the base flows prescribed (R. Pre-hearing Order dated June 29, 1987, J.A. 15-16).<sup>7</sup> The Board concluded that

<sup>7</sup> During the hearing, a member of the PCHB invited Tacoma, over the State DOE's objection, to make a submission as to whether

the State DOE's streamflow quantities were intended to be the optimum flows for the purpose of enhancing the fishery, and that such flows did not satisfy provisions of State water law requiring a balancing of competing beneficial uses (Pet. App. 54a). It vacated the § 401 certificate and remanded with directions that a new certificate be issued containing Tacoma's recommended base flow quantities.

## 2. Judicial Proceedings.

a. *Superior Court.* The State DOE and Departments of Fisheries and Wildlife petitioned the Superior Court for review of the PCHB ruling. In a May 8, 1991 memorandum opinion, the Superior Court held that because FERC had not yet made any determination as to the appropriate instream flow, *California v. FERC*, 495 U.S. 490 (1990), was inapplicable (Pet. App. 42a). The court then entered formal Findings of Fact, Conclusions of Law and Final Judgment (Pet. App. 29a). It affirmed the PCHB's decision that the minimum flow condition required by the State DOE was not preempted by federal law, reversed the Board's ruling that the State DOE's minimum flow regime was an enhancement under state law, and reversed the Board's conclusion that state law does not permit an enhancement flow condition in the circumstances (Pet. App. 35a).

b. *Washington Supreme Court.* The Supreme Court of Washington granted Tacoma's motion for direct review and affirmed the Superior Court's judgment. (Pet. App. 5a; 28a). First, it ruled that under § 401, the

the Department's prescribed flows rendered the Elkhorn Project economically unfeasible (R. PCHB Tr., Dec. 18, 1987, 23-25; 60-62; 72-73, J.A. 91-96). The PCHB ultimately rejected Tacoma's proffer of an affidavit stating that the project would not be feasible at the proposed flows. It held that the affidavit was "not relevant to the subject of the base flows which this matter presents." (R. PCHB Order of June 29, 1988, J.A. 103; R. Affidavit [of Garth Jackson,] Pertaining to Economic Feasibility attached to Tacoma's Motion to Supplement the Hearing Record To Add Economic Feasibility Information dated February 4, 1988, J.A. 98-99).



streamflow conditions in the § 401 certificate were necessary to assure compliance with the State's water quality standards because those standards prohibit degradation of the State's waters and particularly degradation of fish habitat and spawning in the Class AA Dosewallips (Pet. App. 6a-8a). Citing the definition of pollution in CWA § 502(a), 33 U.S.C. § 1362(a), the court also held that "man-induced alteration of streamflow level is 'pollution'" (Pet. App. 8a).<sup>8</sup> Finally, the court rejected Tacoma's contention "that water quality standards are limited to pollution and discharges, as opposed to stream flow levels \* \* \*." (Pet. App. 9a). It invoked precedents from other States holding that designated uses, including fish habitat, are an integral part of water quality standards (Pet. App. 8a-10a).

*Second*, the court held that application of RCW 90.54.020(3)(a) (Supp. 1992), requiring retention of base flows in perennial streams necessary to preserve fish and wildlife, was applicable under the CWA § 401(d)'s provision permitting States to condition water quality certificates on "any other appropriate requirement of State law" (Pet. App. 10a-14a). The court rejected Tacoma's contention that this phrase refers only to water quality standards. The court observed that § 401(d) expressly lists §§ 301, 302, 306 and 307 of the CWA as sources for the limitations in § 401 certificates, but that § 303, relating to water quality standards, is not expressly listed. It then concluded that Congress must have intended the phrase "any other appropriate requirement of State law" to refer broadly to all State water quality-related laws, not just to § 303 State water quality standards (Pet. App. 10a; 13a).

*Third*, the court rejected Tacoma's contention that the FPA preempted the streamflow conditions in the § 401

<sup>8</sup> The court cited a letter written to the FERC by an assistant administrator of the EPA to the effect that "[p]rotection of water quality involves far more than just addressing chemistry \* \* \* [r]elevant water quality issues include . . . the diversity and compensation of the aquatic species . . . [and] habitat loss. . . ." (Pet. App. 8a).

certificate (Pet. App. 14a-21a). It held that such conditioning was not independent State action (Pet. App. 14a), but instead was fulfillment of the State's "federally mandated role in the comprehensive federal scheme embodied in the Clean Water Act" (Pet. App. 17a). Therefore, in the court's view the preemption doctrine did not apply. Even if there were independent State action, the court continued, there would be no preemption under the FPA. There could be no "field" preemption because "Congress left room for the States to supplement the FPA through the section 401 certification process." (Pet. App. 19a). There could be no "conflict" preemption for two reasons. First, "the same streamflow condition could have been required directly under the FPA, either by FERC directly or by FERC adopting recommendations regarding streamflow from Ecology during the licensing process." (Pet. App. 19a). Second, the State DOE's mandate required it to act before FERC had determined streamflow conditions (Pet. App. 19a). *California v. FERC*, 495 U.S. 490 (1990), was inapplicable because there is no conflict and "[t]he way in which the Clean Water Act is implicated in the present case completely alters the legal context \* \* \*." (Pet. App. 21a).

#### SUMMARY OF ARGUMENT

1. In the FPA, Congress vested in FERC exclusive responsibility over streamflow questions, power needs and environmental and ecological concerns arising in hydroelectric licensing proceedings. *First Iowa Hydro Elec. Coop v. FPC*, 328 U.S. 152 (1946); *California v. FERC*, 495 U.S. 490 (1990). The Washington Supreme Court held that the preemptive effect of the FPA under these precedents was inapplicable here because the streamflow limitations imposed under CWA § 401 were necessary to assure compliance with State laws integrated into the CWA. The court errs because the determination of streamflow quantities to protect fish habitat at hydroelectric projects is outside the scope of § 401 and remains the exclusive responsibility of the FERC. FERC must adopt conditions to protect, mitigate damages to, and

enhance fish habitat under FPA §§10(a)(1) and 10(j). Thus, the issue in this case is not whose proposed stream-flow quantities adequately protect fish habitat. It is who Congress intended to prescribe such conditions: the FERC, or State agencies that are limited to certifying compliance with the water quality requirements specified in CWA § 401.

2. The Washington Supreme Court rejected Tacoma's argument "that water quality standards are limited to pollution and discharges, as opposed to streamflow levels" (Pet. App. 9a). The plain language of § 401, however, makes clear that the delegation of certification authority to the States therein is confined to determining whether "such discharge[s]" into the navigable waters as "may result" from federally licensed or permitted activities, will comply with water quality standards authorized under § 303, and with effluent and other limitations specified in § 401(a). Customary usage defines "discharge" as an outletting or a release. A "discharge" cannot be a diversion, impoundment or interruption of a stream's flow. Regulation and control of "discharges" has been the fulcrum of the CWA since 1972. *EPA v. California*, 426 U.S. 200, 202-208 (1976); *Arkansas v. Oklahoma*, — U.S. —, 112 S. Ct. 1046, 1054-1055 (1992). Because diverting or impounding quantities of water are not "discharges", the State DOE lacked authority under § 401 to condition the Elkhorn Project's diversion in order to leave greater quantities in the stream. Moreover, the conditioning authority in § 401(d) becomes applicable only when there is a polluting discharge that cannot otherwise be found in compliance with the water quality standards and limitations enumerated in § 401.

3. Discharges from the Elkhorn Project, once properly identified in the § 401 certificate, must comply with water quality standards under § 303 to qualify for a § 401 certification. The plain language of § 303(c)(2)(A) establishes that a State water quality standard must "consist of the designated *uses* of the navigable waters involved *and* the water quality *criteria* for such waters

based upon such uses" (emphasis added). The Washington Supreme Court reasoned that because one of the "uses" protected by Washington's water quality standards includes the propagation of fish, any "man-induced alteration of streamflow level" that impacts fish habitat is pollution that violates such standards (Pet. App. 7a-8a). "Criteria" are the operative regulatory mechanisms under § 303. Uses designated by a State are the water quality goals that the criteria protect. By focusing solely on uses, the Washington Supreme Court wrongly read Congress' conjunction of uses and criteria out of the statute. Uses cannot be an independent basis for conditions in a § 401 certificate because they represent broad societal goals, not scientifically ascertainable compliance factors. "Criteria" have been the primary regulatory mechanism for water quality standards ever since the 1965 amendments to the ~~FPA~~ authorized the States to "adopt \* \* \* water quality *criteria* applicable to interstate waters \* \* \*." 79 Stat. 908 (emphasis added). Washington has not identified any discharge from the Elkhorn Project that would violate any criteria.

CWA

The antidegradation policy in Washington's water quality standards implement EPA regulations (40 C.F.R. §§ 131.6 and 131.12). The policy is intended to assure that when designated uses and criteria are established or revised they will not allow the degradation of streams. The policy cannot be applied under § 401 independently of the criteria element in § 303(c)(2)(A), for to do so would ignore the specific requirements Congress adopted in that provision.

The challenged streamflow conditions concern the amount of water that may be diverted and the amount that must be left in the by-pass reach. Section 303 standards concern water quality, not water quantities. Water quantity issues are excluded from the CWA by §§ 101(g) and 510(2) in order to prevent interference, by the CWA's federally controlled standards, with proprietary water rights under State law. Congress excluded water quantity issues from direct regulation under the



federally controlled water quality standards authorized in § 303. As Senator Muskie explained early in the legislative development of water quality standards “[w]e are concerned with water quality, not water quantity.” 109 Cong. Rec. 19,678 (1963). Since water quantity issues are generally excluded from the Act, the diversion of water quantities cannot constitute “pollution” as defined in CWA § 502(19). Hydrologic modifications like dams and diversion structures are non-water quality factors that may limit the designation of “uses” for a water body. Congress provided for guidelines, not direct regulation of the impacts on water quality, of disruptions of streamflow by such modifications. CWA § 304(f)(2)(F).

4. A State law requirement under § 401(d) can be “appropriate” only to assure compliance by specific discharges with the standards and limitations under the enumerated provisions in § 401(a). When, as in this case, the only relevant standards to be applied are § 303 water quality standards, other State law requirements are “appropriate” only if they contain scientifically ascertainable *criteria* to guide the conditioning of discharges in the § 401 certification. The Washington Supreme Court believed that any water quality-related State law deemed to control “pollution” was “appropriate”. Under § 401, however, diversion of water quantities is neither a discharge nor “pollution”.

The standard of “appropriateness” in § 401(d) also refers to CWA § 510(1), which allows limitations and standards by the States that are not less stringent than applicable CWA standards. Section 510(1) thus preserves state laws for abatement of pollution from preemption by the CWA. It does not render those laws automatically “appropriate” to the control of discharges for purposes of § 401, unless they can be and are specifically applied to such discharges in order to achieve compliance with § 401’s enumerated requirements. Moreover, § 510(1) does not prevent preemption by the FPA of State laws whose application to hydroelectric projects is outside the scope of § 401.

5. Regulation of the use of water in navigable streams is the heart of the comprehensive federal licensing scheme in Part I of the FPA. Washington’s expansive reading of § 401 subverts that scheme. Under FPA § 10(j) FERC must: (1) include conditions to protect fish and wildlife in any license it grants; and (2) accept conditions recommended by State and federal fish and wildlife agencies, unless it finds such conditions to be inconsistent with the purposes and requirements of the FPA. The Washington Supreme Court’s misconstruction of § 401 preempts FERC’s opportunity to make § 10(j) findings, and defeats the Congressional purpose in adding § 10(j) to the FPA in 1986. There is no basis for concluding that when Congress adopted § 401 in 1972 it unwittingly overruled *First Iowa and California v. FERC* in order to authorize the States to determine the quantities of water that a federally licensed hydroelectric project may use.

## ARGUMENT

### I. THE ISSUES IN THIS CASE REQUIRE THE CONSTRUCTION AND APPLICATION OF §§ 401 AND 303 OF THE CWA IN LIGHT OF THE FPA’S COMPREHENSIVE REGULATORY SCHEME.

Congress’ intent in enacting the Federal Water Power Act of 1920, the FPA’s predecessor statute, was “to secure a comprehensive development of national resources.” *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 181 (1946). The Court has observed that the key to that comprehensive development is centralization of licensing authority in one federal administrative body which would exercise a consistent and comprehensive planning role. *Id.* at 164, 182. Absent an express and exceptional delegation to the States of authority to impose requirements on this process, FERC’s pervasive jurisdiction over the licensing of hydroelectric projects is exclusive. *FPC v. Oregon*, 349 U.S. 435, 446 (1955). These principles recently were reconfirmed in *California v. FERC*, 495 U.S. 490 (1990), which held that a State’s attempt to impose minimum streamflow conditions in a water permit

was preempted by the FPA because such an exercise of State power conflicted with the FERC's licensing authority.

The Supreme Court of Washington held these precedents to be inapplicable because "[b]y including base flow limitations in the section 401 certificate it issued to Tacoma, Ecology was acting to fulfill its obligation under federal law. The section 401 certificate must assure compliance with State laws integrated into the Clean Water Act." (Pet. App. 16a). The court has erred because the determination of streamflow quantities to protect fish habitat at hydroelectric projects is outside the scope of § 401. Such determinations remain the exclusive responsibility of the FERC under FPA §§ 10(a)(1) and 10(j).

The Washington Supreme Court's reasoning requires that this Court determine, in relation to Part I of the FPA: the scope of the certification authority in § 401(a); for purposes of certifying compliance with § 303 water quality standards, the applicable requirements for such standards;<sup>9</sup> and the extent of the conditioning authority conferred by § 401(d). The merits of the streamflow quantities proposed by Tacoma, and the State and federal wildlife agencies, to FERC and to the State DOE are not before this Court. The ultimate question in this case is who Congress intended to determine appropriate streamflow quantities for hydroelectric projects: FERC's Commissioners, who under FPA §§ 4(e), 10(a) and 10(j) protect fish habitat while balancing the full range of public interests, or State officials whose mandate under the CWA is limited to reviewing discharges from such projects under § 401 solely for the purpose of determining compliance with specific water quality requirements.

Contrary to the Washington Supreme Court's decision, Congress did not, in § 401, adopt *sub silentio* a State hydropower regulation scheme completely inconsistent

<sup>9</sup> Washington has never claimed that the streamflow conditions were justified under any of the other sections of the CWA enumerated in § 401.

with the comprehensive responsibilities Congress assigned to FERC in Part I of the FPA. Section 401 "gives States exclusive authority only to issue a certification, prior to licensing, that any *discharge* into navigable waters will comply with [ §§ 301, 302, 303, 306 and 307 ]." *Pennsylvania Dep't of Env'tl. Resources v. FERC*, 868 F.2d 592, 598 (3rd Cir. 1989) (emphasis added).<sup>10</sup> If this Court agrees with Tacoma that Washington has exceeded the limits of the statutory authority delegated to it in § 401, then the streamflow quantities required in the § 401 certificate issued by the State DOE are invalid. If the Elkhorn Project otherwise satisfies the FPA's public interest requirements for a license, any minimum flow quantities "to adequately and equitably protect, mitigate damages to, and enhance" fish habitat must, and will be prescribed by FERC under FPA § 10(j). See also §§ 4(e) and 10(a)(1).

## II. STATE CERTIFICATION AUTHORITY UNDER § 401 IS LIMITED TO DETERMINING WHETHER DISCHARGES FROM FEDERALLY LICENSED HYDROELECTRIC FACILITIES COMPLY WITH EPA-APPROVED WATER QUALITY STANDARDS AND OTHER LIMITATIONS ENUMERATED IN § 401.

### A. § 401 Is Confined To "Discharges" Which May Result From Licensed Activity.

The Washington Supreme Court rejected Tacoma's argument "that water quality standards are limited to pollution and discharges, as opposed to streamflow levels" (Pet. App. 9a). It reasoned that the policies and goals articulated in water quality standards "all demonstrate a broad concern for water quality, not just with pollution discharges." (Pet. App. 9a-10a). This ruling is incon-

<sup>10</sup> In *Pennsylvania v. FERC*, the Third Circuit rejected a contention by a State environmental agency that FERC unlawfully intruded on the State's certification authority under § 401(d). FERC refused to waive license articles requiring its review and approval of project modifications intended to maintain State water quality standards.



sistent with the plain language of § 401, which is the primary guide to Congress' intent. *United States v. Ron Pair Enterprises*, 489 U.S. 235, 242 (1989).

Section 401(a)(1) categorically limits State certification authority to determining whether any discharge into the navigable waters which may result from federally licensed or permitted activity will comply with water quality standards authorized under § 303 and the effluent and other limitations specified in § 401(a)(1). This construction is patent from the relevant words in the statute, as emphasized below:

Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, *which may result in any discharge into the navigable waters*, shall provide the licensing or permitting agency a certification from the State in which the *discharge* originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the *discharge* originates or will originate, that *any such discharge* will comply with the applicable provisions of sections 301, 302, 303, 306, and 307 of this Act (emphasis added).

Although the term "discharge" is used throughout the Act, Congress did not provide a general definition. Section 502(16) provides only that:

The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

This language, however, is not actually definitional. It is therefore necessary to resort to other aids to statutory construction.

The first of these is customary usage, for Congress is deemed to use undefined terms in statutes according to their generally understood meaning. *Pioneer Inv. Services Co. v. Brunswick Assocs.*, — U.S. —, 113 S. Ct. 1489, 1494-95 (1993). A standard dictionary definition of "discharge" includes: "to give outlet to: pour forth:

emit (the river [*discharges*] its waters into the bay) \* \* \*." *Webster's Third New International Dictionary* 649 (1971). Thus an indispensable element of "discharge" in relation to receiving waters is an emitting or outletting. In no sense of the term is there an implication that "discharge" means to divert, impound or interrupt the flow of a stream.

A second aid to construction is the statutory context in which the language is used. *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) (applying *noscitur a sociis*). The triggering event in § 401 is "any discharge *into* the navigable waters" that may result from a federally licensed activity. The term "into" clearly implies the concept of an *addition* of something to the receiving waters. Such an addition occurs when matter is let out or emitted into the receiving waters that would not be there but for the discharge. It thus includes water that has been diverted or impounded from the flow of the stream, that is later returned or released into the stream.

#### **B. Since 1972 The Scheme Of The CWA Has Been Directed To The Control Of Discharges.**

Because the term "discharge" is used without qualification in § 401, it must be given a practical construction that achieves the Congressional objective of eliminating discharges that will pollute the navigable waters. Guidance can be drawn from the CWA's regulatory scheme, which has been focused principally on the control of polluting discharges since 1972.

In 1972,<sup>11</sup> Congress changed the primary mechanism for the control of water pollution from ambient water

<sup>11</sup> The Federal Water Pollution Control Act Amendments of 1972 ("1972 Amendments"), Pub. L. No. 92-500, approved October 18, 1972, 86 Stat. 816. The Clean Water Act grew by legislative accretion beginning in 1948. Pub. L. No. 845, approved June 30, 1948, 62 Stat. 1155. The principal amendments relevant here are the Water Quality Act of 1965 ("1965 Amendments"), Pub. L. No. 89-234, approved October 2, 1965, 79 Stat. 903; the Water Quality Improvement Act of 1970 ("1970 Amendments"), Pub. L. No. 91-224, approved April 3, 1970, 84 Stat. 91; the 1972 Amendments; and the

quality standards to a system for eliminating the discharge of pollutants. *EPA v. California*, 426 U.S. 200, 202-208 (1976); *Arkansas v. Oklahoma*, — U.S. —, 112 S. Ct. 1046, 1054-1055 (1992). The scheme relies principally on EPA-issued "effluent limitations" restricting discharges of pollutants from point sources. These limitations are supplemented by State water quality standards approved by EPA under § 303, "so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels." *Arkansas v. Oklahoma*, — U.S. at —, 112 S. Ct. at 1054 citing *EPA v. California*, 426 U.S. at 205, n.12. Regulation and control of discharges into the navigable waters form the fulcrum of the CWA's regulatory mechanisms.

The apex of that fulcrum is § 301(a) of the Act, which makes unlawful the discharge of any pollutant. This sweeping prohibition, however, is subject to exceptions for discharges in compliance with the effluent limitation provisions contained in § 301, and other requirements in specified sections, including §§ 402 and 404, 33 U.S.C. §§ 1342 and 1344, of the Act. Section 402 establishes the National Pollutant Discharge Elimination System ("NPDES") under which the EPA (or an EPA-authorized State) may issue permits for the discharge of pollutants from "point sources"<sup>12</sup> that meet other requirements of the Act.<sup>13</sup> Section 404 authorizes the Corps to issue per-

Clean Water Act of 1977 ("1977 Amendments"), Pub. L. No. 95-217, approved December 27, 1977, 91 Stat. 1566.

<sup>12</sup> There is no assertion in this case that the Elkhorn Project is a "point source."

<sup>13</sup> For purposes of administering the NPDES, under § 402, EPA regulations implementing § 502(12) define "discharge of pollutants" in terms of the additions of pollutants into the waters of the United States from "point sources". 40 C.F.R. § 122.2. Discharges from dams that add nothing to the receiving waters from the outside world are not subject to the NPDES program because § 502(12) requires that there be an "addition" of matter. *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 174-75 (D.C. Cir. 1982); *National*

mits for the discharge of dredged or fill material into the navigable waters at specified disposal sites, whether or not from a "point source".<sup>14</sup>

Because § 402 and § 404 both establish discharge control systems, all applicants for individual § 402 and § 404 permits issued by EPA or the Corps must obtain a § 401 certificate (or a waiver) from the State where the discharge will originate before the responsible federal agency will issue a permit for the discharge. 40 C.F.R. § 122.4(b); 33 C.F.R. § 330.4(c). Where there is no discharge, however, there is no § 401 requirement. Therefore, the Corps' nationwide permit ("NWP") program, which governs permit requirements under CWA § 404 and several other statutes<sup>15</sup> carefully distinguishes between activities that require State § 401 certificates, and those that do not. Section 401 certificates are not required when the permitted activity, in the Corps' opinion, "could not reasonably be expected to result in a discharge". 33 C.F.R. § 330.4(c)(3), n.1. The Corps' administrative construction thus properly recognizes that § 401 applies only when there is a discharge into the navigable waters of the United States.

Although hydroelectric facilities can affect streamflow by diverting or impounding quantities of water, such modifications are not "discharges" within the meaning of § 401. Therefore, States may not attempt to condition such diversions or impoundments in order to leave greater quantities in the stream. As discussed *infra* (pp. 37-42).

*Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 583-84 (6th Cir. 1988).

<sup>14</sup> Corps regulations governing § 404 permits define "discharge of dredged and fill material" to mean the addition of such material to the waters of the United States. There is no "point source" limitation. 33 C.F.R. § 323.2.

<sup>15</sup> The NWP program applies to permit requirements under § 10 of the Rivers and Harbors Act of 1899, § 103 of the Marine Protection, Research, and Sanctuaries Act, as well as CWA § 404. 33 C.F.R. § 330.1(g).



the CWA applies only to water quality, not water quantity issues. The conditioning authority in § 401(d) applies only to specific polluting discharges that would otherwise violate § 303 water quality standards or other water quality limitations enumerated in § 401(a). Cf. *Natural Resources Defense Council v. EPA*, 859 F.2d 156, 169-70 (D.C. Cir. 1988) (under § 402, EPA is not authorized to impose non-water quality permit conditions, and is limited to regulating the discharge of pollutants, not the discharging activity).

**C. The Legislative History Confirms That § 401 Is Confined To Discharges.**

The legislative development of § 401 also confirms that it is confined to the certification of discharges. The requirement for a State certification of discharges from federally licensed activities originated in § 103 of the 1970 Amendments, which added Section 21(b) to the FWPCA. Section 103, P.L. 91-224, 84 Stat. 108 (1970). Section 21(b) was literally broader in scope than the current CWA § 401(a)(1) because it authorized the State to certify "that there is reasonable assurance, as determined by the State or interstate agency that *such activity* will be conducted in a manner which will not violate applicable water quality standards." (emphasis added). When Congress revised § 21(b) in the 1972 Amendments, it expressly eliminated § 21(b)'s reference to "such activity". Under § 401(a) the State certifies "that *any such discharge* will comply with applicable provisions of sections 301, 302, 303, 306 and 307 \* \* \*." 1972 Amendments, 86 Stat. 877 (1972) (emphasis added). The Senate Report on § 401 explained that § 21(b) in the existing law was being "amended to assure consistency with the bill's changed emphasis from water quality standards to effluent limitations based on the elimination of any *discharge* of pollutants" (emphasis added).<sup>16</sup>

<sup>16</sup> S. Rep. 414, 92d Cong., 2d Sess. 69 (1972), reprinted in Congressional Research Service, *A Legislative History of the Water Pollution Control Act Amendments of 1972* ("1972 Leg. Hist."), Serial No. 93-1, 93d Cong., 1st Sess. 1487 (1973).

The legislative history of § 21(b) also indicates that § 401's delegation to the States was not intended to reach activities that do not result in discharges. The proposal came from § 16(c) of the Senate version as reported. S. Rep. No. 351, 91st Cong., 1st Sess. 113 (1969). The Senate Report, discussing the applications of § 16(c), explained that it was not intended "to apply to the multitude of individual licenses and permits which may be issued by the Federal Government. \* \* \* Almost all such licenses are for activities which are not intended to result in discharges or otherwise affect the waters of the United States \* \* \*." *Id.* at 27.<sup>17</sup> Congress' focus on "discharges" in § 21(b) was continued and refined in 1972 when the words "such discharge" were inserted in § 401.

**D. Water Discharged From A Hydroelectric Facility Complies With § 401's Requirements If It Is Not Altered.**

Operation of a hydroelectric facility may result in the addition of matter to a stream that adds to, or changes, the water diverted from a stream or impounded behind a dam. The discharge may contain additional matter or water the condition of which has been changed as a result of the Project,<sup>18</sup> or it may return the water without alteration. These potential impacts explain why FERC's licensing process requires applicants to consult with State § 401 certification agencies. 18 C.F.R. § 4.38(a).

Hydroelectric facilities may fall within the scope of § 401 in two ways. First, the construction of such facil-

<sup>17</sup> Congress adopted the House bill, H.R. 4148, 91st Cong., 2d Sess. (1970), but incorporated substantial portions of the Senate bill, S. 7, 91st Cong., 1st Sess. (1969). The House bill did not contain any provisions for state certification.

<sup>18</sup> For example, impounded water when released may contain low dissolved oxygen, dissolved minerals and nutrients, cooled water, sediment, or dissolved gases such as nitrogen. *National Wildlife Fed'n v. Gorsuch*, 693 F.2d at 161-165. The streamflow conditions in this case are not based on any discharge of impounded water having such water quality consequences.

ities may result in the discharge of matter associated with construction (including dredged and fill material for which a § 404 permit would also be required). Section 401 clearly applies to such discharges and Tacoma does not contend otherwise.<sup>19</sup> Second, the operation of a hydroelectric facility necessarily results in the discharge of water. The number and nature of the discharges that result from such facilities depend on the particular facility's configuration and mode of operations.

In general, hydroelectric projects use the gravitational force of water as it moves down a stream from an upper to a lower elevation to drive a mechanical turbine that spins a generator, and thus produces electricity. The force of the falling water is exploited by a dam, or by a diversion structure like the Elkhorn Project's weir, that diverts water *into* a penstock, which then conveys the water down and into the turbine. Water that has passed through the turbine is then returned to the stream somewhere below the powerhouse, through a conveyance known as a tailrace.<sup>20</sup> Thus, hydroelectric facilities typically involve at least one discharge. Hydroelectric facilities like the Elkhorn Project are operated in a "run-of-the-river mode", in which total releases are matched as closely as possible to total inflow to the project. Other hydroelectric facilities will operate in a store-and-release mode where a reservoir is used as active storage and the volume of the water stored fluctuates as releases are scheduled.<sup>21</sup>

<sup>19</sup> The State DOE's § 401 certificate sets forth a number of conditions to prevent specified pollutants from entering the water during construction activity, *e.g.*, petroleum products, paint, chemicals such as creosote, dredge spoils, leachates and sanitary waste (Pet. App. 84a).

<sup>20</sup> In addition to the tailrace, dams will contain other mechanisms for releasing water into the stream below, including such devices as crest-gates, sluice-gates and release valves that may be used to reduce pressure behind the dam, to spill water over the top during high water or to allow for maintenance on the turbine facility. See C.C. Warnick, *Hydropower Engineering*, 122-148, 209-215 (1984).

<sup>21</sup> *Energy Law and Transactions* § 53.01 (1993); see also John S. Gulliver & Roger E.A. Arndt, *Introduction to Hydropower Engi-*

In sum, a discharge from a hydroelectric facility occurs when water is released or emitted that has been removed or blocked from the flow of the stream. Neither diversion, impoundment nor intake of water through a penstock can be "a discharge into the navigable waters" under § 401(a) because a discharge requires an outletting or emission of waters that have either been previously diverted from the stream, or previously impounded.

Section 401 requires two determinations: (1) whether there is a discharge; and if so, (2) whether the discharge complies with applicable water quality standards and other limitations enumerated in § 401. If the waters that are thus discharged from a hydroelectric project are unchanged from what went in, then the discharge necessarily complies with the applicable § 401 standard. On the other hand, if the discharge results in an addition to or change in the condition of the water that would prevent compliance with the § 303 water quality standards and other limitations enumerated in § 401, the conditioning authority in § 401(d) becomes applicable with respect to that specific discharge. If there is no "addition" or change, the discharge complies with § 401 and it must be certified. Cf. *Appalachian Power Co. v. Train*, 545 F.2d 1351, 1377 (4th Cir. 1976) (discharger not required to treat and reduce pollutants in intake water).

*National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988), illustrates the need for an addition or change. That case involved a pumped storage

neering, in *Hydropower Engineering Handbook*, Section 1.3 (John S. Gulliver & Roger E.A. Arndt eds., 1991). Projects may use diversion structures or dams. The configuration of such projects, *i.e.*, the design and placement of the dam or diversion, penstock, power house, etc. depends on the physical characteristics of the site, including such matters as the change in elevation that produces the water's power head, the hydrologic characteristics of the stream, and cost and environmental considerations bearing on the various construction and operating choices practically available in the circumstances. *Id.* See also C.C. Warnick, *Hydropower Engineering*, 6-8 (1984).



project that drove its turbines electrically to pump water from Lake Michigan through conduits to a reservoir above the powerhouse. At peak hours, the flow was reversed, and the water was released down the conduits to drive the turbines mechanically and produce electricity. The water then passed through a short conveyance back into the lake. Some fish were entrained through the turbines as water flowed from the lake to the reservoir and back again. The Sixth Circuit found that nothing had been added to Lake Michigan by the release that had not already been there. In consequence, because there had been no discharge of pollutants, the facility did not require an NPDES permit under § 402. The Sixth Circuit followed the reasoning of *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), which similarly held that NPDES permits are not required for hydroelectric facilities because such facilities add no pollutants to the receiving waters from the outside world.<sup>22</sup>

<sup>22</sup> Cases under § 313 of the CWA, 33 U.S.C. § 1323, are consistent with *Consumers Power* and *National Wildlife Fed'n v. Gorsuch*. Section 313 subjects federal facilities engaged in activity that results in the discharge or run-off of pollutants to compliance with all federal, State, interstate and local requirements concerning control and abatement of water pollution. In *Missouri v. Department of the Army*, 672 F.2d 1297, 1304 (8th Cir. 1982), the Court of Appeals affirmed a district court's holding that release of water from a Corps dam did not cause the discharge of a pollutant because there was no addition of a pollutant from a point source. In a subsequent case under § 313, *United States v. Tennessee Water Quality Control Bd.*, 717 F.2d 992, 999 (6th Cir. 1983), cert. denied, 466 U.S. 937 (1984), the court held that seepage through a dam to the riverbed below similarly did not constitute a discharge that added pollutants to the stream.

### III. UNDER § 303, OBJECTIVE "CRITERIA", NOT "USES", ARE THE FUNDAMENTAL REGULATORY MECHANISM.

#### A. The Plain Language of § 303(c) Makes "Criteria", Not "Uses", The Regulatory Basis For Determining Compliance.

To obtain a § 401 certification, identified discharges from the Elkhorn Project must comply with § 303 water quality standards ("WQS"). State authority is limited by the requirements for such standards in § 303. The Washington Supreme Court disregarded the relevant language in § 303(c). It ruled that because one of the "uses" in Washington's WQS as approved by EPA includes the propagation of fish, any "man-induced alteration of streamflow level" that impacts fish habitat is "pollution" that may violate such standards. (Pet. App. 7a-8a). This ruling reflects a fundamental misconstruction of § 303's provisions.

The applicable definition of water quality standards is plainly set forth in § 303(c)(2)(A). To obtain EPA approval under § 303(c), State standards must "consist of the designated *uses* of the navigable waters involved *and* the water quality *criteria* for such waters based upon such uses \* \* \*." (emphasis added).<sup>23</sup> Section 303(c)(2)(A) also requires that such standards be "established taking into consideration their use and value for \* \* \*" an open-ended list of water uses, including specifically, the propagation of fish and wildlife. *Id.* Thus, under the language of § 303(c)(2)(A), the "criteria"

<sup>23</sup> Prior to the adoption of § 303 in the 1972 Amendments, 86 Stat. 846, some States had adopted water quality standards pursuant to their own laws. Other States had adopted such standards pursuant to § 10(c) of the FWPCA as amended by the 1965 Amendments, § 5(a), 79 Stat. 907. In § 303(a) Congress provided for the continuation of previously issued State standards unless the Administrator of EPA determined that they were inconsistent with the requirements of the FWPCA prior to the enactment of § 303. In § 303(c)(2)(A), Congress also established requirements for new and revised standards. Whenever a State revises or adopts new standards, it must submit them to the Administrator of the EPA.



provide the operative regulatory requirements and the designated "uses" provide water quality goals that the criteria are to protect and advance.

The Supreme Court of Washington erroneously disregards Congress' careful distinction in § 303(c)(2)(A) between "designated uses" and "criteria" by focusing solely on the fish habitat "use" of the State's water quality standards, in WAC Ch. 173-201, Resp. App. 94a-122a. It also erroneously reads out of the statute the conjunction of the two terms in § 303(c)(2)(A) (*i.e.*, "such \* \* \* water quality standard shall consist of the designated uses \* \* \* and the water quality criteria \* \* \* based upon such uses." (emphasis added)). It improperly treats "and" as if it meant "or". *Bruce v. First Fed. Sav. & Loan Ass'n of Conroe*, 837 F.2d 712 (5th Cir. 1988).

The misapplication of § 303(c)(2)(A) is patent on the face of the State DOE's § 401 certificate. The certificate expressly concedes that the streamflow requirements imposed are in excess of levels needed to preserve water quality, and that they are intended to satisfy the fish protection goals of the various resource agencies and tribes (Statement, *supra* p. 2; Pet. App. 83a-84a).<sup>24</sup> Moreover, neither the PCHB nor the Washington Supreme Court identified any discharge into the Dosewallips River

<sup>24</sup> The PCHB had before it a *post hoc* affidavit that attempted to rewrite the certificate. It is entitled to no weight. The affiant, Mr. Walter Bergstrom, stated that he drafted the paragraph which states that the prescribed flows were "in excess of those required to maintain water quality in the by-pass region. . .". He asserted, however, that he meant only to refer to criteria for water temperature (Pet. App. 77a). Mr. Bergstrom may have helped prepare the certification (*id.*), but the responsible signature was the Department of Ecology's regional manager, Mr. Clark Haberman, not Mr. Bergstrom (Pet. App. 82a-85a). Moreover, although the PCHB noted Mr. Bergstrom's assertion, it concluded "that the base flow limitation in question is not supported by nor intended to be supported by, water quality standards." (Pet. App. 78a) (emphasis in original). The Washington Supreme Court reached its decision by relying on the broad purpose of the State's WQS to protect fish and wildlife, not Mr. Bergstrom's affidavit.

from the Elkhorn Project, or found that any "such discharge" was inconsistent with criteria in WAC 173-201-045, Resp. App. 100a-101a.

#### **B. EPA's Regulations Make "Criteria" The Principal Regulatory Mechanism For Application Of Water Quality Standards.**

Under § 303(c)(3), if the Administrator of EPA is unable to approve a State's WQS, she must promulgate them herself. If she determines that a State's standard meets the requirements of the Act, "such standard shall hereafter be the water quality standard for the applicable waters of that State." Section 303(c)(3). EPA's regulations governing approval of State WQS under CWA § 303 impose a three-part framework on State standards: designation of uses (40 C.F.R. §§ 131.2, 131.6(a), 131.10); protection of each designated use through adoption of one or more criteria (40 C.F.R. §§ 131.2, 131.3(b), 131.6(c), 131.11(a)); and protection from degradation. 40 C.F.R. §§ 131.6(d) and 131.12. Water quality goals, such as the promotion of fish and wildlife "values" and "uses", are to be achieved through implementation of specific, scientifically ascertainable "criteria". See 40 C.F.R. §§ 131.2, 131.5, 131.6, 131.10, 131.11. These criteria provide objective standards for abating and controlling polluting discharges.

EPA's regulations further provide that § 303 standards must serve the dual purpose of (1) establishing the water quality goals for a specific water body, and (2) providing the regulatory basis for the establishment of water-quality-based treatment controls and strategies beyond the technology-based levels of treatment required by §§ 301 and 306 of the Act. 40 C.F.R. § 131.2. Thus, while "uses" must be designated in State WQS, including uses for aesthetics, fish and wildlife protection, and recreation, such uses must be promoted and protected under § 303(c) through specific State water quality criteria.

EPA allows criteria to be either numeric or narrative. In both formats, however, EPA requires that they must be based on a "sound scientific rationale." 40 C.F.R.

§ 131.11.<sup>25</sup> In other words, criteria must have a basis in objective fact. Otherwise they would provide no guidance to permit writers, enforcement authorities and individuals and entities who must comply with such standards.<sup>26</sup> In contrast, "uses" are not scientific parameters but societal objectives. Their significance under § 303 lies in their function as guides for the selection of scientifically ascertainable, and legally enforceable criteria.<sup>27</sup>

Washington's water quality criteria applicable to this case, as set forth in WAC 173-201-045(1)(c), Resp. App. 100a, conform to the standards imposed by § 303 and EPA's regulations; and they have been approved by the EPA. The standards contain objective criteria which (in the case of *Class AA Waters* like the Dosewallips River) are designed to protect characteristic uses including "fish and shellfish reproduction, rearing, and harvesting" (WAC 173-201-045(1)(b)(v), Resp. App. 100a). The criteria do not regulate streamflow. Instead, they include measurable factors such as quantities of fecal coliform organisms; dissolved oxygen; dissolved gases; temperature; pH; turbidity; toxic, radioactive or deleterious material concentrations; and objectively ascertainable conditions that offend the senses of sight, smell, touch or taste. Nowhere in the record, however, is there any indication that any

<sup>25</sup> EPA is also required to promulgate "criteria for water quality accurately reflecting the latest scientific knowledge." 33 U.S.C. § 1314(a)(1). EPA's regulations pertaining to WQS criteria provide that "[s]uch criteria must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use." 40 C.F.R. § 131.11. See also 40 C.F.R. § 131.6(f). A State may adopt in its WQS any water quality criteria which EPA proposes or "any other criteria for which they have sound scientific support." 48 Fed. Reg. 51,400 at 51,411 (1983). See also *Water Quality Standards Handbook*, p. 2-17 (Office of Water Regulations and Standards, EPA, 1983).

<sup>26</sup> Cf. *American Paper Institute, Inc. v. EPA*, 996 F.2d 346 (D.C. Cir. 1993) (sustaining EPA regulations requiring NPDES permit writers to use prescribed methodologies for translating narrative criteria into chemically specific limitations).

<sup>27</sup> 42 Fed. Reg. 56,792 (October 28, 1977).

of these objective criteria would be violated by any "discharge" that may result from the operation of the Elkhorn Project.

Section 401(a) requires a direct link between the particular discharge being examined under § 401 and the State's determination of compliance or non-compliance with the applicable water quality standards. The central objective of the 1972 Amendments to the FWPCA was to restructure the regulatory system around the control of polluting discharges.<sup>28</sup> Because discharges require an emission or outletting, the test for compliance with water quality standards necessarily must be based on whether the discharge is inconsistent with the criteria's objective standards for preventing deleterious changes in the quality of the receiving waters.<sup>29</sup>

### C. Washington's Antidegradation Policy Cannot Be Applied Independently Of The Criteria.

The Washington Supreme Court determined that the instream flows prescribed by the State DOE were necessary to prevent degradation of the Dosewallips under the antidegradation policy contained in Washington's water quality standards.<sup>30</sup> It relied on the determination of State fishery biologists that only such flows would provide

<sup>28</sup> *Arkansas v. Oklahoma*, — U.S. at —, 112 S. Ct. 1046, 1054-1055 (1992); *EPA v. California*, 426 U.S. 200, 202-308 (1976).

<sup>29</sup> In *Arkansas v. Oklahoma*, 112 S.Ct. 1046 (1992), the question presented was whether a direct discharge permit granted by EPA should be invalidated because the discharge violated the water quality standards of a downstream State. The Court ruled that there was no violation, in part because the EPA had determined that the discharge had not resulted in any *measurable* impacts on the levels of criteria pollutants or other relevant listed criteria factors in the waters of the downstream State. For example, the EPA found no detectable change under the phosphorus criterion that protected the aesthetic "use". *Id.* at 1059-60 & n.16.

<sup>30</sup> WAC 173-201-035(8)(a), Resp. App. 98a, one of several general guidelines in the Washington WQS, provides that "existing beneficial uses shall be maintained and protected and no further degradation which would interfere with or become injurious to existing beneficial uses will be allowed."



a sufficient volume of water for the habitat of each fish species in the river (Pet. App. 7a-8a; 24a-27a).

The State's antidegradation policy implements EPA's § 303 regulations for State establishment of WQS. 40 C.F.R. §§ 131.6 and 131.12. Both the State standard and EPA's regulations must be read in the light of the statutory requirements in § 303. For purposes of § 303 WQS, a State's antidegradation policy must assure that in the formulation of such standards, the designated uses and the criteria that protect them do not result in the degradation of streams. The antidegradation policy contemplated in 40 C.F.R. § 131.12 relates to the establishment and revision of WQS and their application in particular permits.<sup>31</sup> It cannot be applied under § 401 independently of the criteria "element" in § 303(c)(2)(A).<sup>32</sup> To do so would establish by regulation an enforcement mechanism unconstrained by specific requirements Congress has adopted in § 303(c)(2)(A).

#### **D. The Legislative History Confirms The Fundamental Regulatory Role Of Criteria.**

The role of criteria as fundamental regulatory standards is clearly reflected in the legislative development of § 303. State WQS were initially authorized in § 5(a) of the 1965 Amendments, 79 Stat. 907. That provision amended the FWPCA by adding a new § 10 authorizing the States to "adopt (A) water quality *criteria* applicable

<sup>31</sup> The role of antidegradation policy as a control on the revision of WQS, not an independent enforcement mechanism, is confirmed by § 303(d)(4)(B) as added by the Water Quality Act of 1987, Pub. L. No. 100-4, § 404(b), 101 Stat. 39, 67-69, 33 U.S.C. § 1313 (d)(4). This section is part of "anti-back sliding" provisions enacted to prevent the loosening of certain effluent limitations and other standards. It provides that, where water quality exceed levels necessary to protect designated uses, the applicable effluent limitations and WQS may be revised only if the revision is consistent with the antidegradation policy established under § 303.

<sup>32</sup> See *Arkansas v. Oklahoma*, 112 S. Ct. at 1059 (upholding EPA's interpretation of Oklahoma's antidegradation standard that the standard "would only be violated if the discharge effected an 'actually detectable or measurable' change in water quality.")

to interstate waters or portions thereof within such State, and (B) a plan for the implementation and enforcement of the water quality criteria adopted \* \* \*." (emphasis added). The criteria and plan were subject to federal approval by the Secretary of Health, Education and Welfare. In establishing the standards, the Secretary and the State were to "take into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other legitimate uses." FWPCA §§ 10(c)(1)-(3). Thus the original focus of water quality standards was on "criteria" that would have use and value for the multifarious applications of water in our society. When § 303 was revised and expanded in the 1972 Amendments to account for the new emphasis on controlling effluent discharges, the primary regulatory function of "criteria" was continued. See, e.g., H.R. Rep. 911, 92d Cong., 2nd Sess. 104-107, 1972 *Leg. Hist.* 791-794.<sup>33</sup> The 1972 Amendments enhanced the federal role under § 303 by providing for detailed supervision of standards by the EPA, including promulgation by the Administrator if a State failed to obtain EPA approval.

#### **E. Section 303 Water Quality Standards Can Not Be Applied Directly To Regulate Streamflow Quantities.**

Minimum streamflow conditions concern the amount of water that may be diverted and the amount that must be left in a stream. The flow conditions imposed in Tacoma's § 401 certificate were concerned with water quantity, not with water quality as defined by the appropriate criteria.

Water quality standards under § 303 do not speak to impacts on water quantities resulting from the effects on streamflow of dams and diversion structures. Water quantity issues are excluded from the CWA by §§ 101(g) and 510(2), 33 U.S.C. §§ 1251(g), 1370(2) (*supra* p. 7,

<sup>33</sup> The revision of the water quality standard provisions in the FWPCA originated in the House. S. Conf. Rep. 1236, 92d Cong. 2nd Sess. 122-124 (1972), 1972 *Leg. Hist.* 305-307.



n. 9), because Congress was concerned that the Act's federally controlled standards might interfere with proprietary water rights under State law. These provisions, like § 27 of the FPA,<sup>34</sup> prevent interference with the proprietary diversion of water.<sup>35</sup> *California v. FERC*, 495 U.S. 490 (1990).

Water quantity issues, particularly in western States, are inseparable from the appropriative rights doctrine, which permits the diversion or impoundment of water, as a property right, on the basis of prior appropriation and beneficial use. See, e.g., *California v. United States*, 438 U.S. 645, 653-663 (1978); *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690, 702-703 and 709 (1899).<sup>36</sup> Washington applies the doctrine of prior appropriation, and declares uses for hydroelectric power to be a beneficial use. RCW § 90.54.020 (Supp. 1992). See *Rettkowski v. Department of Ecology*, 122 Wash.2d 219, 858 P.2d 232 (1993), as modified by Order Changing Opinion, No. 59086-9 (Nov. 1, 1993).

Water is appropriated from streams by diverting or impounding it for consumptive (e.g., domestic water sup-

<sup>34</sup> Section 27 of the FPA, preserves state authority "relating to the control, appropriation, use, or distribution of water \* \* \* or any vested right acquired therein." 16 U.S.C. § 821.

<sup>35</sup> Sections 101(g) and 510(2) apply to the entire CWA. Section 510 was included in the 1972 Amendments. Section 101(g) was added to the CWA in 1977 in order to expand to the entire Act the distinction between control of water quality and proprietary allocation of water quantity. Compare the Wallop Amendment (123 Cong. Rec. 26,762 (1977)), reprinted in Congressional Research Service, *A Legislative History of the Clean Water Act of 1977: A Continuation of the Legislative History of the Federal Water Pollution Control Act* ("1977 Leg. Hist."), Serial 95-14, 95th Cong., 2d Sess. 1030 (1978), with the remarks of Senator Wallop on the final version of § 101(g) at 123 Cong. Rec. 39,211-39,212 (1977), 1977 Leg. Hist. 531-532 (distinguishing between water quality and water quantity).

<sup>36</sup> The appropriation doctrine as applied in the various western States is described in 2 *Waters and Water Rights*, Ch. 11-17 (Robert E. Beck ed. 1991).

plies and stock watering) and nonconsumptive uses (e.g., hydropower). The essence of the appropriation doctrine is that the prior appropriator may divert or impound the amounts to which it is entitled even if the quantities then available to junior appropriators are reduced. When diversion or impoundment for hydroelectric purposes occurs in an appropriative rights State such as Washington, the project owner must obtain the necessary water rights as a condition of its federal license.<sup>37</sup> The § 401 certificate in this case asserts that a State water right must be obtained prior to commencing construction of the project (Pet. App. 83a).<sup>38</sup>

From the standpoint of impacts on water quantities, there is no relevant difference between the diversion of water for purposes of hydroelectric power generation and diversion for other appropriative uses. Both can affect the volume of water for fish habitat. Congress excluded water quantity issues from direct regulation under the federally controlled water quality standards authorized in § 303. Therefore neither the States nor EPA may regulate water quantity under § 303 water quality standards, whether the diversion involved results from a dam creating an impoundment, or a diversion structure like the weir being proposed for the Elkhorn Project.

<sup>37</sup> FERC's Standard License Condition Form L-4, which would apply to the Elkhorn Project, requires licensees to obtain necessary proprietary water rights. *Terms and Conditions for Unconstrued Major Project Affecting Navigable Waters of the United States*, Article 5, Order No. 540, 54 FPC 1792, 1824, 1826 (1975).

<sup>38</sup> No issue concerning conditions that might be attached to the State's water right permit is presented on this record. In Washington, the State DOE has no statutory authority to prioritize water rights or assure the State's public trust authority over the regulation of water resources. *Rettkowski v. the Department of Ecology*, supra p. 38. The Ninth Circuit has recently held, however, that a State water rights permit for an FERC licensed hydroelectric facility must be limited to the allocation of proprietary rights, and that environmental and ecological conditions are preempted under *California v. FERC*, 495 U.S. 490 (1990) and *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152 (1946). *Sayles Hydro Assocs. v. Maughan*, 985 F.2d 451 (9th Cir. 1993).

First, nothing in the text of § 303 authorizes application of its federally required water quality standards to regulate proprietary diversions of water quantities. The Washington Supreme Court believed it had found such authority in § 502(19)'s definition of pollution. The court held that under this broad definition, man-induced alteration of streamflow levels is "pollution" for purposes of Washington's water quality standards (Pet. App. 8a). The court erred. Section 502(19) provides: "The term 'pollution' means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." A change in the quantity of the water in a stream is not a change in the "physical \* \* \* integrity of water."<sup>39</sup> It is a change in the physical characteristics of the stream. Such a change in water quantities cannot be "pollution" under § 502(19) because the CWA applies only to water quality, not water quantity. Moreover, alteration of streamflow by a diversion or impoundment is not a "discharge" subject to State certification under § 401. By erroneously applying "pollution" policies to the Elkhorn Project's proposed water quantity diversion, the Washington Supreme Court disregarded Congress' decision to rely on discrete delegations and specific methodologies for dealing with "pollution". Since State powers are no broader than those conferred in those delegations and methodologies, § 303 could not be applied to regulate streamflow quantities.

Second, EPA's regulations governing State authority under § 303 expressly provide that "consistent with

<sup>39</sup> Moreover, the term "pollution" as defined in § 502(19) is not used in § 303 in any respect relevant to this case. Indeed, the term "pollution" is not used substantively in any of the other sections enumerated in § 401. The word "pollution" appears in § 303 only as (1) an adjective referring to the 1972 amendments to the FWPCA; (2) as an adjective describing state water pollution control agencies (§ 303(c)(1)); and (3) in § 303(d)(1)(A)'s provision requiring States to identify and classify waters for which certain effluent limitations are not stringent enough to implement any WQS.

§ 101(g) \* \* \* of the Clean Water Act, water quality standards shall not be construed to supersede or abrogate rights to quantities of water." 40 C.F.R. § 131.4.

Third, the legislative history of WQS in the FWPCA confirms the distinction between water quality and water quantity. Senator Muskie was the sponsor and floor manager of S. 649, 88th Cong., 1st Sess. (1963), from which developed the WQS adopted in the 1965 Amendments.<sup>40</sup> He was questioned by Senator McGee on the floor of the Senate about the impact of the proposed WQS on proprietary water rights. Senator Muskie assured the Senate that western water rights would not be subjected to the standards being considered, stating: "S.649 does not affect those rights. We are concerned with water quality, not water quantity." 109 Cong. Rec. 49,678 (1963).

Finally, Congress was aware that there may be water quality consequences from the impacts on streamflow of dams and diversion structures. It did not provide direct regulation of such impacts, however. Instead, in § 304(f)(2)(F), 33 U.S.C. § 1314(f)(2)(F), Congress directed the EPA to publish information and guidelines dealing with changes in the flow of navigable waters (and ground waters as well) caused by the construction of dams and flow diversion facilities. EPA lists streamflow and dams among the physical parameters to be examined in order to identify *non-water quality* factors that may be limitations on "uses" for a water body. *Water Quality Standards Handbook*, p. 3-4 (Office of Water Regulations and Standards, EPA, 1983).

<sup>40</sup> The 1963 proposals developed into the 1965 Amendments. Although S. 649 passed the Senate, the House of Representatives took no action on the bill during the 88th Congress. The requirement for water quality standards was enacted by the 89th Congress. (Pub. L. No. 89-234, 79 Stat. 907-909). The difference between S. 649 and the 1965 Amendment related to whether federal or State authorities would initially promulgate the standards, the period for their establishment, and procedures for their review. See S. Rep. No. 556, 88th Cong., 1st Sess. 27 (1963).



Congress was also well aware that releases from licensed hydroelectric dams were subject to the FPA. It specifically transferred from the former Federal Power Commission to the EPA authority over one category of releases: those made from storage at a hydroelectric dam to regulate streamflow for the purpose of water quality control. Non-water quality releases remain FERC's exclusive responsibility. CWA § 102(b)(6), 33 U.S.C. § 1252(b)(6). Congress did not, however, confer storage release authority on the States in § 303 or any other provision enumerated in § 401.<sup>41</sup>

**IV. SECTION 401(d)'s PROVISION FOR CONDITIONING WATER QUALITY CERTIFICATES ON "ANY OTHER APPROPRIATE REQUIREMENT OF STATE LAW" AUTHORIZES ONLY CONDITIONS APPROPRIATE TO DISCHARGES NOT IN COMPLIANCE WITH THE PROVISIONS ENUMERATED IN § 401(a).**

The Supreme Court of Washington's conflation of "criteria" and "designated uses" led it to conclude that fish protection goals under its WQS (WAC 173-201-010, Resp. App. 94a) are "appropriate requirement[s] of State law" under § 401(d) that support minimum streamflow conditions in the State's § 401 certificates. Independently of its reliance on the State's § 303 WQS, the Washington Supreme Court erroneously concluded that § 401(d)'s grant of authority to the States to condition water quality certificates on "any other appropriate requirement of State law" provided federal authorization for

<sup>41</sup> The Washington Supreme Court also relied on a letter to the FERC from an Assistant EPA Administrator (Pet. App. 8a). The letter simply describes the author's position that "protection of water quality involves far more than just addressing water chemistry." (Resp. App. 90a). But cf. *American Paper Institute, Inc. v. EPA*, 996 F.2d 346 (D.C. Cir. 1993). The letter does not support the Washington court's sweeping holding that because designated uses and the prevention of the degradation of water quality are part of a State's WQS under § 401, water quantity may be treated as a water quality issue, or that a release may be found to be inconsistent with WQS on the basis of uses alone.

the State DOE to impose streamflow conditions in the § 401 certificate under RCW 90.54.020(3)(a) (Supp. 1992), because it found that such conditions were "water quality-related." (Pet. App. 10a; 13a).<sup>42</sup> That statute provides that "[p]erennial rivers and streams of the State shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values."

The Court based its holding on its construction of the term "appropriate" in § 401(d). It construed that term as having a breadth equivalent to that of the CWA's stated purpose, as stated in the Act's Declaration of Goals and Policy, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). This reliance on the general preamble of the CWA rather than the specific terms in § 401(d), ignores the context and relationship of the phrase "other appropriate requirement of State law" to the other provisions enumerated in § 401.<sup>43</sup>

A simple question should be asked concerning the "other appropriate requirement of State law" clause in § 401(d): "appropriate to what?" The answer required by the statute is appropriate to the compliance of "discharges" with applicable water quality criteria. State laws regulating such diversions, and conditions limiting such diversions, are not "appropriate" within the meaning of § 401(d). The Washington Supreme Court's disregard of the "discharge" limitation caused it to apply § 401(d) to implement any water quality-related State law deemed to control "pollution," even though the condition it imposed was totally unrelated to ensuring compliance with the State's water quality criteria for a Class AA stream.

<sup>42</sup> The court's standard of "water quality-related" has a breadth that expands the reach of State certification authority under § 401 far beyond the scope of the CWA.

<sup>43</sup> It is well settled that a declaration of policy in a statute does not give rise to independent legal obligations, but merely provides assistance in interpreting those obligations. *Association of Am. R.R. v. Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977).



It is a familiar principle of statutory construction that when general words like "other appropriate requirement" follow specific terms, then "[u]nder the *ejusdem generis* rule of construction the general words are confined to the class and may not be used to enlarge it." *Cleveland v. United States*, 329 U.S. 14, 18 (1946). By relying on the broad goals of the Act, rather than the specific terms associated in § 401(d), the State court has given the phrase "any other appropriate requirement of State law" a breadth that swallows what precedes it, leaving § 401(d) limited only by the requirement that conditions thereunder be related in some way to water. Cf. *Arcadia v. Ohio Power Co.*, 498 U.S. 73 (1990).<sup>44</sup> The sweep of this construction effectively transfers to the States comprehensive authority over the streamflow quantities from hydroelectric projects subject to license under the FPA.

The court attempted to buttress its construction by asserting that the term "appropriate" could not have been limited by water quality standards in § 303 because that section is not enumerated in § 401(d) (Pet. App. 11a-12a). This view is mistaken. Section 301—which is specifically enumerated—expressly incorporates, through subsection 301(b)(1)(C), WQS under the CWA, *i.e.*, under § 303.

The legislative history of § 401 confirms this reading. In the 1977 Amendments to the CWA, Congress made clear that compliance with State WQS was a required element of a § 401 certificate by inserting § 303 whenever §§ 301, 302, 306 and 307 appeared.<sup>45</sup> This concise formulation, however, had the effect of omitting § 303 from § 401(d), because in subsection (d) the sequence of the

<sup>44</sup> See also *Hughey v. United States*, 495 U.S. 411, 418-419 (1990); *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 734 (1973).

<sup>45</sup> Pub. L. No. 95-217, § 64, 91 Stat. 1599, provided: "Section 401 of the Federal Water Pollution Control Act is amended by inserting '303,' after '302,' in the phrase 'sections 301, 302, 306, and 307 of this Act', and in the phrase 'section 301, 302, 306 or 307 of this Act', each time these phrases appear."

enumerated sections was interrupted by words describing those sections (Pet. App. 139a). The omission was without significance because, in the words of the Conference Report on the 1977 Amendments, "[s]ection 303 is always included by reference where section 301 is listed."<sup>46</sup> Thus, contrary to the Washington Supreme Court, the omission of § 303 from § 401(d) did not reflect a legislative purpose to make the State's ability to condition a water quality certificate under § 401(d) unlimited and unconstrained by its authority to deny it under § 401(a).

As the Court of Appeals of New York has ruled, the "appropriate state law" provision in § 401(d) does not "countermand the carefully worded authority of subsection 401(a)(1)."<sup>47</sup> Any condition imposed must be designed to achieve compliance by a particular discharge with the sections of the CWA enumerated in § 401(a)(1). The only subsection relevant here is § 303. A state law is "appropriate" to § 303 WQS only if it provides scientifically ascertainable criteria to guide conditions on discharges under § 401.

The standard of "appropriateness" in § 401(d) also refers to state laws preserved under § 510(1), 33 U.S.C. § 1370(1). That statute provides that "nothing in *this* Act shall (1) preclude or deny the right of any State to \* \* \* adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting abatement or control of pollution; \* \* \*." (emphasis added). If limitations and standards under the CWA are in effect, such laws may not be less stringent than the CWA standards. *Id.* Section 510(1) thus preserves State laws for the abatement of pollution from preemption by the CWA. It does not render those laws automatically "appropriate" to the control of discharges for purposes of § 401. Moreover, § 510(1) does not pre-

<sup>46</sup> H.R. Conf. Rep. No. 830, 95th Cong., 1st Sess. 96 (1977), 1977 Leg. Hist. 280.

<sup>47</sup> *Niagara Mohawk Power Corp. v. New York State Dep't of Env'tl. Conservation*, No. 214, slip op. at 10 (N.Y. Nov. 11, 1993).

vent preemption by the FPA, under *First Iowa* and *California v. FERC*, of State laws whose application to hydroelectric projects is outside the scope of § 401.

**V. WASHINGTON'S EXPANSIVE READING OF § 401 WOULD SUBVERT THE FPA'S COMPREHENSIVE LICENSING SCHEME.**

Regulation of the use of water in navigable streams is the heart of the federal licensing scheme in Part I of the FPA. The scheme requires FERC to balance hydroelectric uses with the many other purposes served by such streams. FERC must carefully consider energy conservation, navigation, irrigation, flood control, water supply, fish and wildlife protection, recreational opportunities and other aspects of environmental quality, as well as power needs. Under FPA § 10(j), 16 U.S.C. § 803(j), it must—not may—include conditions adequate to protect, mitigate damages to, and enhance fish and wildlife in any license it grants. Section 10(j) also requires FERC to accept conditions recommended by State and federal fish and wildlife agencies, unless it finds such conditions to be inconsistent with the purpose and requirements of the Act. The Washington Supreme Court's misapplication of § 401 preempts FERC's opportunity to make such findings, and thus completely frustrates § 10(j)'s careful preservation of FERC's ability to reject wildlife agency recommendations when necessary.<sup>48</sup>

When, in CWA § 401, Congress delegated to the States narrowly defined authority to certify that discharges into navigable waters comply with approved water quality standards under § 303, it never intended to subject FERC licensees to two masters. It would have made no sense for Congress to superimpose on the already complex federal licensing scheme in the FPA a duplicative and expensive layer of State regulation. Such legislation would

<sup>48</sup> See *United States Dep't of Interior v. FERC*, 952 F.2d 538, 545 (D.C. Cir. 1992) ("Even where the fish and wildlife agencies make formal section 10(j) recommendations, those agencies have no veto power.").

have fragmented control of the hydropower licensing process among the 50 States, and reversed Congress' decision in the 1920 Federal Water Act to place exclusive control over private hydroelectric facilities in a single federal agency. *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152 (1946); *California v. FERC*, 495 U.S. 490 (1990).

There is no indication in the language, structure or history of § 401, or its statutory predecessor, § 21(b) of the FWPCA, that when Congress delegated limited authority to the States to certify that discharges from federally licensed activities will comply with State WQS approved by the EPA, it also was authorizing the States to preempt FERC's responsibility for prescribing streamflow quantities necessary to protect fish and wildlife under § 10 of the FPA.

The Washington Supreme Court's construction of § 401 achieves the fragmentation of hydroelectric licensing that Congress eschewed. It invites States unilaterally to impose onerous conditions, in the name of local environmental concerns, that will drastically reduce FERC's control over the licensing process and, ultimately, the reliability of hydroelectric facilities in the nation's power grid. Washington's broad reading of § 401 as applied to hydroelectric projects amounts to a partial repeal of the FPA by implication. Repeals by implication are disfavored. To the maximum extent possible, courts must read related statutes together in order to give effect to each; only when the sense and purpose of each cannot be preserved by such a reading is implied repeal recognized. *Watt v. Alaska*, 451 U.S. 259, 267 (1981) (citing *Morton v. Mancari*, 417 U.S. 535, 549 (1974)). Congress intended that, except for State certification that discharges comply with WQS and other § 401 limitations, all other environmental and ecological issues should continue to be resolved by a single federal tribunal, FERC, under Part I of the FPA.

More than four decades have passed since the Court in *First Iowa* struck down a State's attempt to impose a



broad State permitting requirement on a hydroelectric project under the jurisdiction of the FPC. The Court then stated that requiring the applicant to secure a State permit would "vest in [State authorities] a veto power over the federal project" that could "destroy the effectiveness of the federal act" and "subordinate to the control of the State the 'comprehensive' planning" with which the FPC was charged. *First Iowa Hydro-Elec. Coop. v. FPC*, 328 U.S. 152, 164 (1946). The validity of the *First Iowa* holding has been reaffirmed by the Court on numerous occasions.<sup>49</sup> Its significance here is that State-imposed conditions included in a § 401 certificate but outside the scope of CWA § 401 have the same adverse impact on the scheme of the FPA as conditions otherwise imposed under State law.

The Court recently followed *First Iowa* when it rejected a State's attempt to justify streamflow conditions in a water permit on the basis of FPA § 27, 16 U.S.C. § 821. The FPA's § 27, like §§ 101(g) and 510 of the CWA, preserves State authority to allocate proprietary water rights. *California v. FERC*, 495 U.S. 490 (1990). The Court pointed out that Congress, in its 1986 Amendments to the FPA,<sup>50</sup> had the opportunity to alter FERC's role *vis-à-vis* the States, but chose instead "to elaborate and reaffirm *First Iowa's* understanding that the FPA establishes a broad and paramount federal regulatory role." 495 U.S. at 499.

The 1986 Amendments included a proviso in § 4(e) requiring FERC to give equal consideration, in addition to power and development purposes, to protection and enhancement of fish spawning grounds and habitat. They also mandated, in § 10(j), specific conditions for such

<sup>49</sup> *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 223 n.34 (1983); *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338-39 n.6 (1982); *Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 334 (1958); *FPC v. Oregon*, 349 U.S. 435, 444-45 (1955).

<sup>50</sup> Electric Consumers Protection Act, Pub. L. No. 99-495, 100 Stat. 1243 (1986).

protection and enhancement. These requirements were enacted some fourteen years after § 401 of the CWA. Congress would not have added these provisions to the FPA if the States already had the authority to impose, as water quality conditions under § 401, mandatory streamflow quantities for fish and wildlife purposes. Cf. *Sayles Hydro Assocs. v. Maughan*, 985 F.2d 451, 455-456 (9th Cir. 1993) (holding that the FPA preempts State authority to impose numerous environmental conditions on a licensed project's proprietary water right certificate). Washington's base flow statute, RCW 90.54.020(3)(a) (Supp. 1992), requiring minimum flows for fish and wildlife, scenic and aesthetic, and other environmental values and navigational values, unquestionably would be preempted under *First Iowa* and *California v. FERC*, if it had been applied independently of the federal authority over discharges delegated to the States in CWA § 401.<sup>51</sup> There is no basis for concluding that when Congress adopted § 401, it unwittingly overruled *First Iowa*, and authorized the States to determine the quantities of water that a federally licensed hydroelectric project may use. *Niagara Mohawk Power Corp. v. New York State Dep't of Env'tl. Conservation*, No. 214 (N.Y. Nov. 11, 1993).

<sup>51</sup> The Washington Supreme Court erroneously concluded that the conditions in the § 401 certificate were required by the federal requirements in §§ 401 and 303 (Pet. App. 14a-21a).

**CONCLUSION**

For the foregoing reasons, the judgment of the Supreme Court of Washington should be reversed.

Respectfully submitted,

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